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No. 93-1855

In the Supreme Court of the United States

OCTOBER TERM, 1994

EDWARD R. KORMAN, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a federal district judge may delegate to a magistrate judge the duty of hearing and ruling on a wiretap application.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 10 F.3d 931. The opinion of the district court (Pet. App. 29a-48a) is reported at 784 F. Supp. 1019.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1994. A petition for rehearing was denied on February 15, 1994. Pet. App. 49a. The petition for a writ of certiorari was filed on May 16, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June, 1993, petitioner, a district judge, was acting as Miscellaneous Judge for the United States District Court for the Eastern District of New York. One of the duties of the judge assigned to the Miscellaneous Part is to review applications for electronic eavesdropping orders pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2521 (1988 & Supp. 1992). Petitioner received such an application in connection with an investigation directed by the United States Customs Service and the United States Attorney's Office for the Eastern District of New York. By order dated June 30, 1993, petitioner referred the Title III wiretap application to a magistrate judge for decision. Pet. App. 1a-2a. In support of the referral, petitioner relied on the reasoning of his earlier order dated February 14, 1992, holding that the Federal Magistrates Act (Magistrates Act) authorized the referral of Title III applications to United States magistrate judges, and announcing his intention to refer all such applications to magistrate judges. *In re Application of the United States Attorney for Orders Pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968,* 784 F. Supp. 1019 (E.D.N.Y. 1992) (reproduced at Pet. App. 29a-48a), mandamus denied, No. 92-3080 (2d Cir. Mar. 23, 1993).[1] Petitioner held that the referral was valid under either of two provisions of the Federal Magistrates Act, the "pretrial matters" clause, 28

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[1] Pursuant to a request by the United States, petitioner had approved that earlier application and temporarily stayed his February 14, 1992, order of referral. Gov't C.A. Br. 4. The court of appeals summarily denied the mandamus petition of the United States, which sought to prevent petitioner from implementing that referral order, on the ground that no referral of a Title III application was before the court. Gov't C.A. App. 86-87.

U.S.C. 636(b)(1)(A), and the "additional duties" clause, 28 U.S.C. 636(b)(3).

a. Petitioner held that a wiretap application was a delegable pretrial matter within the meaning of the "pretrial matters" clause of Section 636(b)(1). Pet. App. 31a-32a, 39a-41a. That clause provides that "[n]otwithstanding any provision of law to the contrary[,] * * * a judge may designate a magistrate to hear and determine any pretrial matter pending before the court," except eight specified categories of potentially dispositive motions. Petitioner noted that Title III itself does not include the magistrate judge in its definition of a "judge of competent jurisdiction" authorized to rule on wiretap applications, expressly vesting that power only in "a judge of a United States district court or a United States court of appeals," 18 U.S.C. 2516(1), 2510(9)(a).[2] Pet. App. 32a, 35a. Petitioner determined, however, that the restrictive language of Title III did not bar referral of wiretap applications to magistrates. Pet. App. 38a.

Petitioner so held notwithstanding *United States* v. *Giordano,* 416 U.S. 505 (1974), which he acknowledged "could arguably apply" here. Pet. App. 33a. *Giordano* held that Section 2516(1) of Title III, 18 U.S.C. 2516(1),

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[2] Section 2516(1) provides:

> The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant * * * an order authorizing or approving the interception of wire or oral communications.

Section 2510(9)(a) defines a federal "[j]udge of competent jurisdiction" as "a judge of a United States district court or a United States court of appeals."

which, as originally enacted, empowered only the "Attorney General or any Assistant Attorney General specially designated by the Attorney General" to authorize an application for a wiretap, precluded delegation of such authority to any other subordinate of the Attorney General. See Pet. App. 32a-33a. The Attorney General may ordinarily delegate "any function" to "any other officer" or "employee" of the Department of Justice pursuant to 28 U.S.C. 510. Pet. App. 32a. This Court held, however, that the Title III duties were non-delegable, because Section 2516(1), "fairly read, was intended to limit the power to authorize wiretap applications to the Attorney General himself and to any Assistant Attorney General he might designate." *Giordano*, 416 U.S. at 514.

Petitioner distinguished *Giordano* based on the legislative histories of Title III and of the Federal Magistrates Act, and on the text of the "pretrial matters" clause. Pet. App. 33a. In petitioner's view, Title III's restrictive definition of "judge of competent jurisdiction" responded to the deficiencies in the old commissioner system, which preceded the federal magistrate system. Pet. App. 34a-35a. Congress determined that, although existing practice permitted United States commissioners to issue search warrants, such practice was "too permissive for the interception of wire or oral communications." Pet. App. 35a, quoting S. Rep. No. 1097, 90th Cong., 2d Sess. (1968). Petitioner viewed the Magistrates Act, enacted later that year, as a "more direct[ ]" remedy for the deficiencies in the commissioner system, however. Pet. App. 35a. The Magistrates Act replaced the commissioners with United States magistrates and ensured that they would be more competent and professional than their predecessors. *Id.* at 36a-38a. Petitioner concluded that, in light of the replacement of commissioners with the more reliable magistrates, "the referral of an eavesdropping application to a United States magis-

strate judge does not implicate any of the concerns underlying Title III's facially restrictive definition of judges who are competent to issue eavesdropping orders." *Id.* at 38a.

Petitioner also distinguished *Giordano* on the ground that, in contrast to the provision authorizing the Attorney General to delegate responsibilities, the Federal Magistrates Act was enacted in 1976, "after the enactment of Title III[,] and it contains a clause that permits the delegation of specified authority vested in district court judges *notwithstanding* any existing law to the contrary." Pet. App. 33a. In specifying that pretrial duties can be delegated "notwithstanding any provision of law to the contrary," Congress intended to "overcome any problem which may be caused by the fact that scattered throughout the code are statutes which refer to 'the judge' or 'the court.'" Pet. App. 39a, quoting S. Rep. No. 625, 94th Cong., 2d Sess. 7 (1976); H.R. Rep. No. 1609, 94th Cong., 2d Sess. 9 (1976). Petitioner held that the broad authority to delegate "pretrial matters" to magistrate judges pursuant to Section 636 thus overrode Title III's express restriction of wiretap approvals to district and appellate judges.

b. Petitioner alternatively found authority to delegate the Title III application to magistrate judges in the "additional duties" clause of the Magistrates Act. Pet. App. 41a-48a. That clause states that "a magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. 636(b)(3). Petitioner held that the authorization of wiretaps could be delegated despite the clause's requirement that the delegation of a duty not be "inconsistent with the Constitution and laws of the United States," and this Court's statement in *Peretz* v. *United States,* 111 S. Ct. 2661, 2667 (1991), that "the delegated duty not be of 'far

greater importance' than specified duties that may be assigned to magistrates." Pet. App. 42a-43a.

According to petitioner, "[t]he delegation of a Title III application to a United States magistrate judge is not inconsistent with Title III merely because the latter provides that judges of the United States district courts may issue eavesdropping orders." Pet. App. 43a. Petitioner reasoned that "[a]ny case to which the 'additional duties' clause may be applicable will also involve the delegation of some duty that is vested initially in a judge." *Ibid.* Section 2510(9)(a) is not "inconsistent" with delegation because, in petitioner's view, "the facially restrictive definition of judges competent to issue Title III orders was not written for the purpose of denying United States magistrate judges the authority to issue such orders." Pet. App. 43a-44a.

Petitioner also concluded that the delegation of Title III applications to magistrate judges is not inconsistent with Article III of the United States Constitution. Pet. App. 46a-48a. Many magistrate functions require the parties' consent, see *Peretz* v. *United States,* 111 S. Ct. at 2667-2669, or may only be undertaken by magistrates subject to de novo review by the district court, see *United States* v. *Raddatz,* 447 U.S. 667 (1980); 28 U.S.C. 636(b)(1). In petitioner's view, however, no such constraints apply to magistrates' wiretap orders, "because the authorization of a wiretap falls within the category of nonadjudicatory functions that need not be performed by an Article III judge." Pet. App. 47a.

Petitioner analogized review of wiretap applications to the "additional duty" of issuing search warrants (which magistrates are expressly authorized to grant under Federal Rule of Criminal Procedure 41(a)). Pet. App. 44a. Petitioner reasoned that review of wiretap applications is an even more appropriate task for magistrate judges than

issuance of warrants because of the greater "burden of considering these applications" and of continuing to monitor wiretaps once they are approved. *Id.* at 45a.

2. The court of appeals granted the United States' mandamus petition and reversed. Pet. App. 1a-28a. The court held that Congress deliberately and specifically limited the Title III power to approve wiretap applications, and that the general catchall provisions of the Magistrates Act do not empower magistrate judges to approve such applications. *Id.* at 10a. The court emphasized that "in enacting Title III, Congress showed great concern for protecting individual privacy against the vast potential for intrusion posed by wiretapping." *Id.* at 14a. A wiretap is "like a continuous film of events in your home, secretly recorded over a period of weeks or months," and is therefore "far more intrusive than the familiar search pursuant to a warrant," which is more like a "snapshot." *Ibid.* Title III consequently "tightly control[s]" the authorization of wiretaps and the use of evidence derived from them. Pet. App. 5a.

The court of appeals acknowledged the intent behind the 1976 amendment of the Magistrates Act that statutory references to "the judge" or "the court" be read to include magistrate judges. Pet. App. 9a-10a. The court determined, however, that because Congress placed strict controls on the authorization of wiretaps in order to protect personal privacy, reviewing wiretap applications was not a delegable task. *Ibid.* The court concluded that, in view of Congress's privacy concerns, "any Congressional expansion of the list of those officers authorized to approve wiretaps would be specific rather than general and indirect." *Id.* at 10a.

The court of appeals also relied on the Electronic Communications Privacy Act of 1986 (Privacy Act), Pub. L.

No. 99-508, 100 Stat. 1848 (codified as amended at 18 U.S.C. 3121-3127), which amended the definition section of Title III in many respects but did not amend the Section 2510(9)(a) definition of courts competent to approve wiretaps. Pet. App. 8a, 10a-11a. The court believed that Congress's failure to amend Section 2510(9)(a) was especially significant in view of the Privacy Act's specific authorization of magistrates to approve pen registers and trap and trace devices, which identify numbers dialed to or from a telephone but do not allow eavesdropping on conversations. Pet. App. 11a, 7a n.5. The court explained:

> If Congress in 1986 had believed magistrates to be "judge[s] of competent jurisdiction," as the term is used in Title III, 18 U.S.C. § 2510(9), who are authorized to issue wiretapping orders, then the Privacy Act could have empowered magistrates to issue pen register orders with a simple reference back to § 2510(9). Instead, however, the 1986 Privacy Act specifies persons empowered to authorize pen register orders by reference to a separate 'court of competent jurisdiction' section, which, unlike § 2510(9), specifically includes magistrates. See 18 U.S.C. § 3127(2)(A).

Id. at 8a-9a. In the court's view, "[t]here is a sharp contrast between the stringent controls over wiretap orders * * * and the much less onerous conditions for obtaining pen register and trap and trace authorization. * * * Congress * * * saw pen register and trap and trace monitoring, which magistrates may authorize, to be qualitatively different from wiretapping, which only an Article III federal judge or a state court judge of general criminal jurisdiction may authorize." *Id.* at 11a.

The court of appeals also rejected petitioner's attempts to distinguish *United States* v. *Giordano, supra,* which it viewed as "a case strikingly similar to the case at hand."

Pet. App. 11a. "The *Giordano* Court based its holding on the purpose and the legislative history of Title III, fairly read. The same approach also supports the view that Congress wanted to limit the power to review applications to specified judicial officers." *Id.* at 12a.

Judge Cardamone dissented. Pet. App. 15a-28a. Although he noted that whether district courts may delegate Title III applications to magistrate judges "presents a close question of statutory interpretation," *id.* at 15a, he agreed with petitioner that both the "pretrial matters" clause and the "additional duties" clause authorized that delegation.

ARGUMENT

Petitioner contends that the Federal Magistrates Act authorizes district court judges to delegate to magistrate judges the determination whether to issue Title III wiretap orders. Pet. 13-23. Petitioner is the only judge in the United States who has sought to delegate Title III applications to magistrate judges in the entire 26-year history of the Federal Magistrates Act and Title III. See Pet. App. 3a. The court of appeals correctly held that such delegation is unauthorized, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. Title III vests the exclusive power to authorize federal wiretaps in "a judge of a United States district court or a United States court of appeals," 18 U.S.C. 2510(9);[3] it does not empower magistrate judges to grant such authorization. The limitation of wiretap authorization to Article III judges is one of several stringent con-

[3] Authorization of wiretaps at the state level may be made by "a judge of any court of general criminal jurisdiction of a State." 18 U.S.C. 2510(9)(b). The discussion in this brief is limited to authorization at the federal level.

trols on the issuance and execution of wiretaps under Title III. Congress deliberately imposed such controls in response to the degree of invasion of privacy involved in electronic eavesdropping. "Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where circumstances warrant the surreptitious interception of wire and oral communications." *United States* v. *Giordano,* 416 U.S. 505, 515 (1974).

The court of appeals correctly held that construing the Magistrates Act to empower magistrate judges to approve wiretaps would conflict with Title III. Pet. App. 14a-15a. *Giordano* requires close adherence to Title III's textual restrictions. The purpose of Title III "was effectively to prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in the Act." *Giordano,* 416 U.S. at 514. Section 2510(1) allowed only "the Attorney General, or any Assistant Attorney General specifically designated by the Attorney General," to authorize a Title III application. Despite the Attorney General's power to delegate duties, *Giordano* held that duties under Section 2510(1) had to be performed by the specified officials. Section 2510(9) bars delegation of authority to approve wiretaps to magistrates just as clearly as Section 2516(1) precluded the Attorney General's delegation of authority to apply for wiretaps. Because Congress has not "specifically provided" in Title III that magistrate judges may authorize wiretap applications, *Giordano* compels rejection of petitioner's position.[4]

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[4] Petitioner concedes that "the Attorney General's delegation power was analogous to the power of district judges to delegate under the Magistrates Act." Pet. 21 n.16. He distinguishes *Giordano* on the

Congress's intent to limit the judicial officers who may approve wiretaps is underscored by the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, codified as amended at 18 U.S.C. 3121-3127. See Pet. App. 7a-11a. The Privacy Act regulates law enforcement use of pen registers and trap and trace devices, which identify incoming and outgoing telephone calls. The Act extensively amended Title III, including the "Definitions" Section, 18 U.S.C. 2510, subsection 9 of which contains the Article III judge requirement.[5] Congress conspicuously left subsection 9 untouched, however, while it adopted a separate provision—Section 3127(2)—that defines a federal "court of competent jurisdiction" solely for purposes of pen register and trap and trace authorization as "a district court of the United States (including a magistrate of such a court) or a United States Court of Appeals." 18 U.S.C. 3127(2)(A). As the court of appeals pointed out, a simple reference to 18 U.S.C. 2510(9), rather than a separate new subsection, would have sufficed if magistrate judges were already encompassed within 18 U.S.C. 2510(9). Pet. App. 20a-21a.[6]

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ground that Congress added the "pretrial matters" clause to the Magistrates Act after it enacted Title III. *Ibid.* As the court of appeals pointed out, however, *Giordano* did not turn on the timing of Title III's enactment, but on Congress's concern to protect privacy, which the Court held requires strict adherence to the statutory text. Pet. App. 9a-10a.

[5] The Privacy Act made changes to subsections 1, 2, 4, 5, 8, 9(b), 10 and 11, and added subsections 12-18 to Section 2510. Pub. L. No. 99-508, Tit. I, § 101(a), (c)(1)(A) and (4), 100 Stat. 1848-1849, 1851.

[6] Petitioner contends that the court of appeals impermissibly rested its decision on "subsequent legislative materials" in relying on the 1986 Privacy Act. Pet. 19-22. The court of appeals, however, properly relied on the contrast between the treatment of magistrates under Sections 3127(2)(A) and 2510(9) in order to give Title III "that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law." *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 100 (1991).

2. Petitioner erred in relying on the Magistrates Act provision allowing district courts to assign "any pretrial matter" to a magistrate judge. Pet. App. 31a-41a. Although the "pretrial matters" clause applies "[n]otwithstanding any provision of law to the contrary," the court of appeals correctly concluded that Congress did not intend it to expand the class of judges empowered under Title III to authorize wiretaps. Pet. App. 10a.

Petitioner relies on legislative history explaining that the "notwithstanding" preamble was intended to make clear that general statutory references to "the judge" or "the court" do not preclude delegation to magistrates. Pet. App. 39a, quoting S. Rep. No. 625, 94th Cong., 2d Sess. 7 (1976); H.R. Rep. No. 1609, 94th Cong., 2d Sess. 9 (1976). The text of Section 2510(9) of Title III is, however, far more specific than a mere reference to "the judge" or "the court." Title III contains the highly distinctive feature of empowering judges of the courts of appeals as well as the district courts to authorize wiretaps. Congress's decision to include federal appellate judges underscores the importance it attached to the office of persons reviewing wiretap applications. It would be anomalous to conclude that Congress implicitly sanctioned delegation of that duty down to the cadre of federal magistrates.

It is unclear whether review of wiretap applications is even properly considered a "pretrial matter" under the Magistrates Act, as it does not relate to any trial or proceeding taking place under the auspices of the court. Congress's failure to specify wiretap authorizations as an enumerated pretrial matter, subject to de novo review, produces the unlikely consequence that magistrates could rule on wiretaps subject only to review for clear error. See 28 U.S.C. 636(b)(1). Given Congress's careful attention to avoiding unnecessary privacy intrusions of the gravity

posed by wiretaps, that conclusion is not plausible. Cf. *Gomez* v. *United States*, 490 U.S. 858, 873-874 (1989).

3. Petitioner also erred in invoking the "additional duties" clause, 28 U.S.C. 636(b)(3). Pet. App. 41a-48a. That clause allows delegation to magistrate judges only where "not inconsistent with the Constitution and laws of the United States." *Ibid.* Because Title III expressly limits the authority to authorize wiretaps to district court and court of appeals judges, assigning that function to magistrate judges is "inconsistent" with Title III.[7]

Petitioner sought to avoid that result by asserting that "[a]ny case to which the 'additional duties' clause may be applicable will also involve the delegation of some duty that is vested initially in a judge." Pet. App. 43a. Duties that district courts have delegated to magistrate judges, however, are generally assigned to "the court" or "the judge," and not more specifically, as under Title III, to "a judge of a United States district court or a United States court of appeals." For example, as petitioner noted, Federal Rule of Criminal Procedure 31 "provides that a jury verdict shall be returned to 'the judge' in open court," Pet. App. 43a n.10, and judges have delegated to magistrate judges the duty of accepting verdicts. *United States* v. *Johnson*, 962 F.2d 1308, 1312-1313 (8th Cir.), cert.

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[7] Under *Gomez*, "[a]ny additional duties performed pursuant to a general authorization in the statute should bear some relation to the specified duties." 490 U.S. at 864. Petitioner draws an analogy between issuance of search warrants and authorization of wiretaps. Pet. 19; Pet. App. 40a-41a. The differences in Congress's treatment of search warrants and wiretap authorizations are more telling, however, than their similarities. Unlike search warrants, which Federal Rule of Criminal Procedure 41(a) authorizes magistrates to grant, no such express authority exists under Title III. See pp. 9-11, *supra*. Indeed, Congress in enacting Title III deliberately chose to treat wiretap applications differently from warrant requests. Pet. App. 35a, quoting S. Rep. No. 1097, 90th Cong., 2d Sess. (1968).

denied, 113 S. Ct. 358 (1992). But Title III far more specifically identifies the judicial officers who may authorize a wiretap.[8]

4. Petitioner emphasizes the burdens that wiretap applications impose on district courts, noting that applications are accompanied by "long and prolix affidavits" and are followed by "equally lengthy and prolix renewal applications." Pet. App. 45a-46a. Wiretap applications are extensive because Congress requires that they include detailed information to ensure that wiretaps are justified. 18 U.S.C. 2518(1)(a)-(f) and (2). The limitation in Section 2510(9) derives from the same basic concern. It would be particularly inappropriate to rely on the burdens posed by one Title III safeguard as a reason to erode another.

In any event, the burdens wiretaps impose on the judiciary remain manageable. See Administrative Office of the United States Courts, Statistics Division, *Wiretap Report* (1993) (*1993 Report*). In 1993, federal judges au-

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[8] Congress did intend district courts to "experiment" with the use of magistrate judges under the Federal Magistrates Act in order to free their own time for uniquely judicial tasks. See S. Rep. No. 371, 90th Cong., 2d Sess. 26-27 (1968); S. Rep. No. 625, 94th Cong., 2d Sess. 10 (1976). Much of that experimentation is, however, valid only with the parties' consent. See, *e.g.*, *Peretz* v. *United States*, 111 S. Ct. 2661 (1991) (presiding over jury selection); *United States* v. *Arnoldt*, 947 F.2d 1120, 1124 (4th Cir. 1991) (accepting jury verdict), cert. denied, 112 S. Ct. 1666 (1992); *Allen* v. *United States*, 921 F.2d 78, 80 (6th Cir.) (reading final jury instructions to jury), cert. denied, 111 S. Ct. 2896 (1991); *United States* v. *Demarrias*, 876 F.2d 674, 677 (8th Cir. 1989) (presiding over jury deliberations, relaying jury questions to district judge, communicating judge's responses to jury, and accepting verdict). The "consent" rationale, however, cannot logically be applied to a wiretap application, which may be granted ex parte, 18 U.S.C. 2518(3), and which results in a sealed order, 18 U.S.C. 2518(8)(b). The target of a wiretap has no knowledge of it, and therefore cannot "consent" to delegation of an application to a magistrate until long after the application has been ruled on.

thorized 450 wiretap applications, and granted 459 extensions. *1993 Report*, at 9. Most of the 1018 federal judges sitting in 1993 received few if any wiretap applications that year. Even in those jurisdictions with the highest levels of law enforcement activity, judges rarely review more than three to five wiretap applications per year.[9] In view of the required annual reporting to Congress under 18 U.S.C. 2519(1), Congress is well aware of the extent of judicial involvement in authorizing wiretaps, and that magistrates have not participated in that process. Congress has not amended Title III to shift to magistrates the duty of authorizing wiretaps, and the court of appeals correctly declined to achieve that result through the Magistrates Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] See generally *1993 Report*, Appendix A.